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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSE T. INDRELUNAS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court did not enter an opinion, and its judgment is not reported (Appendix A, *infra,* pp. 13–15). The opinion of the court of appeals (Appendix B, *infra,* pp. 16–26) is reported at 465 F. 2d 163.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1972 (Appendix, *infra,* p. 16). A petition for rehearing and suggestion for rehearing *en banc* was denied on August 22, 1972. On November 13, Mr.

490-029—72

Justice Rehnquist extended the time for filing a petition for certiorari to December 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, under Rule 58 of the Federal Rules of Civil Procedure, every civil judgment of a district court must be set forth on a separate document in order to start the time for filing an appeal.

RULE INVOLVED

Rule 58 of the Federal Rules of Civil Procedure provides as follows:

ENTRY OF JUDGMENT

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

STATEMENT

This controversy arises from federal income tax assessments made against Harry Foiles and respondent Alphonse Indrelunas.[1] Both individuals made partial payment of this assessment, and after their unsuccessful administrative claims for refund, Mr. Foiles in 1964 initiated a refund suit in the district court pursuant to 28 U.S.C. 1346. The government answered and filed a counterclaim against Foiles for the balance of the unpaid assessment[2] and a third-party complaint against Indrelunas claiming that he was also liable for the tax. After a jury trial, a verdict was rendered on March 21, 1969, finding neither man liable for the tax (Appendix, *infra,* p. 17). After the verdict was returned, the district court clerk, upon oral instructions from the bench, entered the jury's decision on the docket for this case. No written judgment set forth on a separate document

[1] The assessment was based upon the determination, under Sections 6671–6672 of the Internal Revenue Code of 1954, that both Foiles and Indrelunas, as corporate officers, were persons responsible for collecting, accounting for, and paying over the withholding taxes of a now defunct business, that they willfully failed to collect these taxes, and that they were therefore liable for a penalty equal to 100 percent of the unpaid taxes.

[2] While normally a taxpayer seeking to contest a tax determination in the district court must first pay the full amount determined to be due before filing his refund suit (*Flora* v. *United States*, 357 U.S. 63, affirmed on reargument, 362 U.S. 145), there is an exception to this rule which permits partial payment of the Section 6672 penalty tax, representing the withholding tax of one or more employees each quarter. After this partial payment has been made, the Government must counterclaim for the balance which it claims is due. *Psaty* v. *United States*, 442 F. 2d 1154, 1158–1159 (C.A. 3).

was prepared, signed or entered at this time (Appendix, *infra,* pp. 17–18).

At the time of the verdict, there was no agreement among the parties as to the amount of money to be refunded to Foiles. More than fourteen months later, after the parties agreed upon the amount of refund due to Foiles, a "stipulation of damages" (specifying the amount of refund) was filed on May 14, 1970. A notice of appeal as to Foiles only was filed within sixty days of this date on July 9, 1970, but the government did not pursue this appeal (Appendix, *infra,* pp. 17–18). On February 23, 1971, the government moved for entry of a formal judgment in favor of both Foiles and Indrelunas. On February 25, 1971, the district judge entered his Memorandum Opinion and ordered that formal judgments be entered (Appendix, *infra,* pp. 13–15). On March 8, 1971, the government filed a motion for judgment notwithstanding the verdict, which was denied on that day. The government then filed a notice of appeal as to the judgment entered against Indrelunas within sixty days thereafter, on May 6, 1971.

The court of appeals, without reaching the merits of the government's appeal, ruled that a judgment had been entered pursuant to Rule 58, Federal Rules of Civil Procedure, when, at the time of the verdict, the clerk made a docket entry indicating that Foiles and Indrelunas were not liable for the penalty. The court held that the requirement set forth in Rule 58 that "Every judgment shall be set forth on a separate document" does not apply to judgments entered on

the simple type of verdict described in clause (1) of the Rule (Appendix, *infra*, pp. 23–24):

> * * * we are of the opinion that when the jury verdict is clear and unequivocal, setting forth a general verdict with reference to the sole question of liability and where nothing remains to be decided and when no opinion or memorandum is written, as is the situation described in clause (1) of Rule 58, there is no requirement for a separate document to start the time limits for appeal running.

Accordingly, the court held that the government's notice of appeal, which was not filed until after the entry of judgment on a separate document, was untimely.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with decisions of the Third and Fifth Circuits, and is inconsistent with the clear language of Rule 58 of the Federal Rules of Civil Procedure, and the Notes of the Advisory Committee on Rules which explain the purpose of the 1963 amendment to that Rule. The question raised is of continuing importance to all civil litigants in the federal courts within the Seventh Circuit.

1. In *Levin* v. *Wear-Ever Aluminum, Inc.*, 427 F. 2d 847 (C.A. 3), the trial court had entered oral orders granting plaintiff's motion to dismiss against one defendant and holding another defendant liable to the plaintiff in the amount of $35,000. Both of these orders were noted by the clerk on the docket, but no separate document embodying a judgment was filed. The Court of Appeals for the Third Circuit held that

the separate-document requirement of Rule 58 is "mandatory in all cases" (427 F. 2d at 849) and dismissed the appeal as premature. In *Pure Oil Co.* v. *Boyne,* 370 F. 2d 121 (C.A. 5), the trial court had also held one defendant in an admiralty suit not liable, and had found one defendant liable for half the determined amount of damages. Applying Rule 58, the Fifth Circuit held that the time for noting appeal began to run, not when the clerk noted the trial court's orders with a minute entry in the docket, but two months later when the trial judge issued his formal decree. Recognizing that Rule 58 had changed the law to require a separate document in all cases, the court stated that "The only document which can constitute final judgment for purposes of appeal is the formal decree". 370 F. 2d at 123. As the Seventh Circuit in this case recognized, its holding is in direct conflict with these decisions (Appendix, *infra,* p. 23).[3]

2. Prior to the 1963 amendment to Rule 58, it was frequently very difficult for litigants to know whether a judgment had been entered in a federal civil suit, and, if so, precisely when the judgment was deemed to

[3] The instant decision may also be in conflict with the recent decision of the Fourth Circuit in *Superior Life Insurance Co.* v. *United States,* 462 F. 2d 945. The court below felt that its decision was also in conflict with the decision of the Tenth Circuit in *United States* v. *Evans,* 365 F. 2d 95. Although there are dicta in *Evans* which indicate that the Tenth Circuit agrees with our view of Rule 58 (see 365 F. 2d at 98), the judgment in question in that case appears to have been considerably more complex than the judgment at issue here. Furthermore, there were other compelling grounds for the court's holding in that case that the judgment was not final. See also *Hamilton* v. *Nakai,* 453 F. 2d 152 (C.A. 9).

have been entered. This uncertainty caused considerable confusion and gave rise to much unnecessary appellate litigation. See, *e.g., United States* v. *Schaefer Brewing Co.*, 356 U.S. 227; *Beacon Federal S & L Ass'n* v. *Federal Home Loan Bank Bd.*, 266 F. 2d 246 (C.A. 7).

In 1963, Rule 58 was amended to insure certainty with respect to the date of a civil judgment.* The amended rule describes two types of judgments, which may be generally characterized as simple judgments entered "upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied", and more complex judgments entered "upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories". With respect to simple judgments, the Rule provides that the clerk may prepare and enter judgment "without awaiting any direction by the court." With respect to more complex judgments, the Rule directs that "the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it." Having drawn this distinction between simple judgments which may be entered by the clerk without direction and more complex judgments which require the clerk to obtain the trial judge's approval of the form of judgment, the Rule then states that "Every

* The 1963 amendment to Rule 58 was adopted by this Court January 21, 1963, pursuant to 28 U.S.C. 2072, and was reported to Congress by the Chief Justice on the same day. 374 U.S. 861, 863, 889.

judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."[6]

The court below has held that the separate-document requirement of Rule 58 applies only to the complex judgments described in clause 2 of the rule. It is difficult to understand the basis of that holding. The structure of Rule 58 indicates quite clearly that the distinction between simple and complex judgments is relevant only with respect to the question whether the clerk is required to obtain the approval of the trial judge before entering judgment. The language of the sentence in question, which states that "Every judgment shall be set forth on a separate document," appears unambiguously to preclude any distinction between types of judgments with respect to the requirement of a separate document. And by reviving the use of subjective factors such as the "attitude of the parties" to determine the time when judgment has been entered (Appendix, *infra*, pp. 24–26), the court of appeals has reintroduced into the federal litigative process the unnecessary and confusing analysis which gave rise to cases such as *Schaefer Brewing Co.* and *Beacon*

[6] Rule 58 deals only with the question whether a judgment has been properly entered. It does not purport to deal with the question whether the judgment constitutes a "final decision" within the meaning of 28 U.S.C. 1291, which provides generally that appeals may be taken only from "final decisions" of a district court. While it is possible that the judge and the litigating parties may not intend that a particular judgment, though properly entered on a separate document, be considered "final", the issue of finality is not present here due to the absence at the relevant time of the requisite judgment document.

Federal S & L Ass'n, supra. The Notes of the Advisory Committee on Rules (Appendix C, *infra*, pp. 27–29) specifically refer to these cases as reflecting the confusion which the amended rule sought to eliminate. As the Committee concluded in explaining the purposes of the 1963 amendment, "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document" (Appendix, *infra*, p. 29).[6]

3. The decision below directly affects all federal court litigants within the Seventh Circuit. Precise and certain knowledge as to the date of a judgment is required not only for filing post-judgment motions (Rule 59, Federal Rules of Civil Procedure), and for filing appeals (Rule 4, Federal Rules of Appellate Procedure), but also for purposes of judgment enforcement. Without inconvenience to litigants or to district courts, the separate-document requirement of Rule 58 provides a simple, objective test by which all parties can determine when a final judgment has been entered, and thus avoids needless and protracted controversy. If the decision of the Seventh Circuit is allowed to stand, attorneys practicing before the federal courts in that circuit will be forced to file premature post-trial motions and notices of appeal whenever they believe a judgment *may* have been entered. The decision will inevitably divert the time and attention of litigating parties and the courts to matters not germane to the merits of appeals, and

[6] This Court has also noted the importance of certainty with respect to establishing the date of an appellate court judgment for purposes of determining the timeliness of a petition for certiorari. *Commissioner* v. *Estate of Bedford*, 325 U.S. 283, 288.

thus it threatens the speedy and efficient administration of litigation in the courts within the appellate jurisdiction of the Seventh Circuit.

4. This Court has special supervisory powers with respect to the promulgation and administration of the federal procedural rules. In accordance with these powers the Court considered and approved the amended rule at issue here before presenting it to Congress (see *supra*, note 4). The court has reviewed numerous lower court decisions involving the construction and application of a federal procedural rule, and has reversed incorrect interpretations when necessary. See, *e.g.*, *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9–10, 14; *Hickman* v. *Taylor*, 329 U.S. 495, 500–514; *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249; *Van Dusen* v. *Barrack*, 376 U.S. 612, 643; and *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111–112. Review is warranted here in order to provide evenhanded treatment of similarly situated civil litigants in all federal courts, and to restore nationwide uniformity and certainty to the application of amended Rule 58.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1972.

APPENDIX A

In the United States District Court for the Northern District of Illinois Eastern Division

No. 64 C 1843

HARRY H. FOILES, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

and

UNITED STATES OF AMERICA, DEFENDANT AND THIRD-PARTY PLAINTIFF

v.

ALPHONSE T. INDRELUNAS, THIRD-PARTY DEFENDANT

Memorandum Opinion and Order

I have been asked by the United States of America to direct judgment in favor of Harry H. Foiles and Alphonse T. Indrelunas, in the amounts of $880.29 for Foiles and $3,621.32 for Indrelunas.

The situation, however, is complicated by clerical error. This case was tried before a jury on the sole issue of liability on March 18, 1969, the amount in controversy having been stipulated by the parties. The jury returned a verdict for Foiles and Indrelunas on March 21, 1969, and the Court thereupon ordered that judgment be entered thereupon. A docket entry and a minute order were made showing the return of that verdict in favor of the two taxpayers and the Court's order that judgment be entered on the

verdict, but no formal judgment order was signed by the Judge and filed "forthwith" as appear to be required by Rule 58 of the Federal Rules of Civil Procedure.

The Government, who almost two years later wishes to appeal this decision, would have the Court believe that this absence from the file of a written formal judgment order, entered in the file forthwith upon the return of the verdict, means that there in fact has been no final order, and the time of appeal would never start running until the moment such formal judgment orders were filed. They cite Federal Rule 58, cases, and Moore's Federal Practice as authority for this point. The other side contends that verbal order, minute sheet record and docket entry were sufficient in spite of Rule 58, that they were sufficient to place the Government on notice to cause the running of time for filing notice of appeal, and that the Government must be deemed to have waived any technical requirement, since the Government waited almost two years before bringing this matter to the attention of the Court.

The cases as researched are split. The lengthy memorandum in Moore's Federal Practice carefully explains that the rule which intended to clear up all doubt as to when a judgment was entered has not done so. Heavily relying on the case of *United States v. V. W. Shaefer Brewing Co.,* 356 U.S. 227 (1958), and upon the statement in the rule that judgments should be on a separate piece of paper (which should be considered in connection with Form 31 for judgments), the editors of that learned treatise conclude that entry can be made only by a formal document issued and signed by the Judge and duly entered forthwith by the Clerk.

While the cases seem inconclusive on interpretation of this critical issue, I find the arguments contained in Moore's persuasive. Further, I feel bound by the conclusion reached in *Funk* v. *Franklin Life Insurance Company,* 392 F. 2d 913 (7 Cir. 1968), wherein our Court of Appeals held that a docket entry and minute order containing the following language, "[E]nter judgment on the verdict for the plaintiffs for the sum due under the policy of insurance, to be computed," was not a final appealable order (at 915).

Therefore, I must allow the motions by the United States to direct entry of formal judgments in favor of Alphonse T. Indrelunas and Harry H. Foiles in the amounts of $3,621.32 and $880.29, respectively, and it is hereby so ordered.

Enter:

/s/ JAMES B. PARSONS,
U.S. District Judge.

Date: February 25, 1971.

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APPENDIX B

In the United States Court of Appeals
for the Seventh Circuit

SEPTEMBER TERM, 1971 APRIL SESSION, 1972

No. 71-1515

HARRY H. FOILES, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT,

v.

ALPHONSE T. INDRELUNAS, THIRD-PARTY, DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 64-C-1843

JAMES B. PARSONS, *Judge*

ARGUED APRIL 25, 1972—DECIDED JULY 5, 1972

Before KILEY and STEVENS, *Circuit Judges,* and LARAMORE,* *Senior Judge.*

LARAMORE, *Senior Judge.* This is an appeal by the United States of America, originally the third-party plaintiff, from the jury verdict and judgment in the District Court for the Northern District of Illinois, in favor of Alphonse T. Indrelunas, originally the third-

* Senior Judge Don N. Laramore of the United States Court of Claims is sitting by designation.

party defendant. The decision of the lower court, pursuant to the verdict of the jury, was that defendant, the president of A.T.I. Trucking Corporation, was not liable for the 100 percent penalty assessed against him for his alleged willful failure to pay over withholding taxes due for 1960–1962 from the said A.T.I. Trucking Corporation. The assessment was made under sections 6671 and 6672 of the Internal Revenue Code of 1954, alleging that defendant was the responsible party and that the failure to pay over the withholding taxes was willful. The original decision in this case also included reference to Harry H. Foiles, the original complainant in the case, who was the treasurer and vice president of A.T.I. Corporation and who was also found not liable under the same statute. Said verdict, which was in reference to liability only, the amount in controversy having been stipulated by the parties, was rendered on March 21, 1969. On that same day the District Court Clerk entered the decision of the jury on the appropriate docket for this case pursuant to oral instructions from the bench that the verdicts be entered of record and that there be judgment on the verdicts so entered. As noted, this verdict was with reference to Foiles, the original complainant, and Indrelunas, the third-party defendant; however, following rendition of the verdict, the government initially decided only to appeal the case as to Harry H. Foiles. Thus, on July 9, 1970, the government filed a notice of appeal as to Harry Foiles but, as the title of this case indicates, that appeal was eventually abandoned when the government chose to pursue its avenues of recovery with reference only to Alphonse T. Indrelunas instead of Mr. Foiles. The specifics of why that decision was made is unknown to the court but the mechanics of putting that decision into effect

has caused this court and the lower court no little concern.

Following the notice of appeal on July 9, 1970, it appears that no further significant action was taken by the government until February 23, 1971, some 23 months following the original decision. At that time a motion was filed by the United States to direct entry of judgment in the original case against the United States and in favor of Harry H. Foiles and Alphonse T. Indrelunas. It appears, and the government so admits (page 7, government brief, footnote 6), that the motion was made solely for the purpose of allowing the appeal against Alphonse T. Indrelunas. In that motion the government contended that the docket entry of judgment made by the clerk at the behest of the District Court following the jury verdict was not the type of formal judgment required by Rule 58, Fed. R. Civ. P., to start the statute of limitations for appeals running (Rule 4, Fed. R. of App. Pro.). The government pointed out that Rule 58 contains the sentence "[e]very judgment shall be set forth on a separate document." Therefore, contends the government, since the files in this case did not contain such a separate document referring to final judgment in favor of Foiles and Indrelunas, as so required by Rule 58, such a separate document should be included forthwith. And, it is not until the inclusion thereof that the applicable time limits for appeal would begin.

On February 25, 1971, pursuant to the motions described above, the District Court ordered that formal judgments be entered in favor of Foiles and Indrelunas. This action was taken following the court's Memorandum Opinion and Order wherein Judge Parsons set forth his decision to grant the government's motion with respect to the formal requirements of entering judgment. It is that decision which will here-

inafter be reviewed and because we cannot agree with the District Court as to the procedural issue heretofore described, we do not address ourselves to the merits of this case.

Judge Parsons, in his Memorandum Opinion and Order, ruled in favor of the government upon their assertion that the separate document must be included before the case is appealable. His reasoning for doing so included reference to Moore's Federal Practice, in general, and the case of *United States* v. *F. & M. Shaefer Brewing Co.,* 356 U.S. 227 (1958), to be discussed *infra.* However, as it appears to this court, greatest reliance for the decision below was placed upon a decision of this circuit in *Funk* v. *Franklin Life Insurance Company,* 392 F.2d 913, 915 (7th Cir. 1968); *Home Fed. Savings & Loan* v. *Republic Ins. Co.,* 405 F.2d 18 (7th Cir. 1968), wherein it was held that a docket entry and minute order containing the language, "[e]nter judgment on the verdict for plaintiffs for the sum due under the policy of insurance, to be computed," was not a *final* appealable order.

Upon carefully considering the *Funk* case it will be noted that the issue concerning the docket entry was in reference to *finality* not an issue relating to sufficiency of the entry for purposes of starting the time limits for appeal. Indeed, the *Funk* decision refers to *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. 541, 546 (1948), as supporting authority. The *Cohen* case, however, speaking generally of appealability at the portion cited by *Funk,* merely recites the well-founded principle that only final judgments are appealable and "[s]o long as the matter remains open, unfinished or inconclusive, there may be no * * * appeal." There can be no dispute with this general

proposition and indeed the court in *Funk* was correct in so citing *Cohen*. However, both *Funk* and *Cohen* were referring to an incomplete verdict and in the *Funk* case the decision of the jury was neither final nor conclusive since it left open the amount of recovery for further proceedings. However, that is not our case here. In this case there can be no question that the case was complete upon the rendering of the verdict. The terms of that verdict are clear and unequivocal and nothing remained to be resolved following its rendition and entry since the amount of recovery had been stipulated and the sole issue for determination by the jury was that of liability. Thus, we have no problem with finality as was the case in *Funk* and for that reason we think *Funk* is not applicable to the case at bar. Nevertheless, the problem presented is far from being resolved once *Funk* is repudiated as authority for the District Court's decision below.

The real problem raised by this case, *i.e.*, interpreting Rule 58, Fed. R. Civ. P., results from the 1963 revision of Rule 58. Prior to that time the problem presented herein would not have arisen since Rule 58 did not make reference to a separate document setting forth every judgment. This again emphasizes our dilemma here, which is, does the Rule as it now reads require that in *every* case a separate document must be on file before the time limits for appeal begin to run? Further isolating the issue, we are not concerned with the sufficiency of the docket entry and minute order because there is no dispute that the court ordered such and the clerk entered the verdict on the appropriate docket (See Rule 79(a), Fed. R. Civ. P.).

As mentioned above, Federal Rule 58 was amended in 1963. It now reads as follows:

Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

The changes made by the 1963 revision[1] were de-

[1] The rule as it read before revision is as follows:

"Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs."

signed, according to the Notes of the Advisory Committee on Rules, to emphasize the difference between the type of verdicts referred to in clause (1) of the Rule, *i.e.*, those that involve uncomplicated, straightforward, decisions of the jury or the court, and those described in clause (2) of the Rule which are of a more complicated nature. [*See*, 28 U.S.C.A., Rules 52 to 58 (1971)]. Thus, in speaking of the clause (1) type judgments, the Notes recite:

> In the first situation, it is clear that the clerk should enter the judgment without awaiting a direction by the court unless the court otherwise orders. * * * The amended rule accordingly deals with them as a single group in clause (1) * * * and requires the clerk to prepare, sign, and enter them forthwith, without awaiting court direction * * *. The more complicated judgments described in clause (2) must be approved by the court before they are entered.

Again referring to the clause (1)-type judgments, Moore's Federal Practice, Volume 6A, 1971 Supplement, page 52, recites:

> * * * Thus in regard to these simple, absolute conclusions, whether by a jury or the court, except in the extraordinary situation where the court deems otherwise, the clerk is to go ahead and enter judgment immediately. In these essentially "yes-or-no" determinations there is no reason for delay due to framing a judgment.

In addition to and in conjunction with the changes referred to above, another more important change was made by the 1963 revision to Rule 58. That change, the significant one for purposes of this case, was the addition of the phrase "[e]very judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." As explained by the Notes of the Ad-

visory Committee, *supra,* this change was made to alleviate the problems exemplified by *United States* v. *F. & M. Shaefer Brewing Co.,* 356 U.S. 227 (1958), wherein the court wrote an opinion or memorandum containing some apparent directive or disposition. It was noted that in such instances the clerks have on occasion viewed such opinions or memoranda as being sufficient to satisfy the requirement set forth by the directive now included as clause (2) of the Rule. However, if the memorandum or opinion did not contain all the elements of a judgment, it became "a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal." (Notes of Advisory Committee, *supra*). Therefore, to alleviate the problem noted, the revision included the separate document requirement. However, and in our opinion, that requirement, since it was designed to eliminate confusion created by memoranda or opinions of the court written as a directive for entry of judgment, was aimed primarily at situations described by clause (2) of Rule 58 since clause (1) does not so require the directive from the court for entry of judgment.

In so interpreting the 1963 revisions of Rule 58 we are aware of certain authority which would favor the position that the separate document is relevant to the situation described in clause (1) as well as clause (2) of Federal Rule 58. *See, e.g., Levin* v. *Wear Ever Aluminum, Inc.,* 427 F.2d 847 (3rd Cir. 1970); *Jenkins* v. *United States,* 325 F.2d 942 (3rd Cir. 1963); *United States* v. *Evans,* 365 F.2d 95 (10th Cir. 1966); *Pure Oil Co.* v. *Boyne,* 370 F.2d 121 (5th Cir. 1966). Nevertheless, we are of the opinion that when the jury verdict is clear and unequivocal, setting forth a general verdict with reference to the sole question of liability and where nothing remains to be decided and

when no opinion or memorandum is written, as is the situation described in clause (1) of Rule 58, there is no requirement for a separate document to start the time limits for appeal running. In this decision we find support not only from relevant case law, *Eulo* v. *Deval Aerodynamics, Inc.*, 47 F.R.D. 35 (D.C. E.D. Pa. 1969), *rv'd in part*, 430 F.2d 325 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1970); *see also, Hannon* v. *Hannon*, 426 F.2d 771 (4th Cir. 1970); *Carey, Baxter & Kennedy, Inc.* v. *Welshire Oil Co.*, 346 F.2d 110, 112 (10th Cir. 1965), but also from the declared intention of the amendment to the rule as set forth by the Advisory Committee, to be discussed forthwith. In addition, we consider significant the attitude of the parties involved herein as indicated by the government's actions in filing a notice of appeal prior to the inclusion of the separate document.

As for the intent of the revision, the Notes of the Advisory Committee, *supra*, state that:

> Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. *See, Matteson* v. *United States*, 240 F. 2d 517, 518–19 (2nd Cir. 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).[2]

This statement, while directed specifically to the inclusion of the last sentence of the present Rule 58, also

[2] If a separate document is in fact promptly filed in compliance with the language of the rule, we assume that the time to appeal would run from the date that document is filed.

erally indicates the desire to encourage reasonable
ed in entering judgment. It is, therefore, in our
nion, more in keeping with the purposes of the re-
on to hold that, in situations as straightforward as
se described by the facts of this case, the period of
itations begins to run from the entry of judgment
the clerk.

ndeed, the docket in this case indicates that the gov-
ment also thought the period of limitations had
un once the docket entry had been made: To wit; the
ket for this case shows an entry on July 9, 1970 of
iled Defendant's Notice of Appeal * * *." This No-
, filed some eight months prior to the February
tion for entry of judgment, indicates to this court
t the government believed the case to be ripe for
peal following the District Court's directive that
ry of judgment be made and there be judgment on
verdicts as so entered.[3] In this case there was noth-
left to be done by the court and everyone involved
understood the judgment to be final. It would,
refore, be somewhat absurd to hold that although
the parties involved understood the case to be at
end, the time limits for appeal would not begin to
until some undetermined point in the future when
ormal document was included in the file. In our

That the intention of the parties is significant in a situation
as this is brought out by *Securities & Exchange Commis-*
v. *Jean R. Veditz Co.*, 22 F.R.D. 479 (S.D. N.Y. 1958)
rein it was stated:

* * * [T]he touchstone is the understanding of the court, the
ties and the clerk, as evidenced by their actions, as to whether
direction of the judge on which the clerk has acted was 'the
ge's final act' and constituted his 'final judgment in the case'
*. [T]his understanding of the court, counsel and clerk as
he finality of the judge's direction may be gathered from
r attitude toward the clerk's notation."

opinion, the crucial element is that the parties understood the original decision to be final. This understanding, together with the entry of judgment on the docket, considered in context with the foregoing interpretation of the present Rule 58, Fed. R. Civ. P., lead us to the conclusion that the government's appeal in this case is untimely. A holding to the contrary would, in our opinion, allow undue advantage to be taken of a revision in Rule 58 which was intended to clarify and speed-up the entry of judgment, not provide an avenue for prolonging litigation. For example, if we were to find that such a formal document is an absolute necessity in every case, there would undoubtedly be cases that could remain appealable *ad infinitum,* notwithstanding the fact that all parties involved believed the case to be at an end. We, therefore, dismiss the defendant's appeal.

A true copy:

Teste:

_____ _____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

NOTES OF ADVISORY COMMITTEE ON RULES TO 1963 AMENDMENT TO RULE 58

1963 Amendment

Under the present rule a distinction has sometimes been made between judgments on general jury verdicts, on the one hand, and, on the other, judgments upon decisions of the court that a party shall recover only money or costs or that all relief shall be denied. In the first situation, it is clear that the clerk should enter the judgment without awaiting a direction by the court unless the court otherwise orders. In the second situation it was intended that the clerk should similarly enter the judgment forthwith upon the court's decision; but because of the separate listing in the rule, and the use of the phrase "upon receipt . . . of the direction," the rule has sometimes been interpreted as requiring the clerk to await a separate direction of the court. All these judgments are usually uncomplicated, and should be handled in the same way. The amended rule accordingly deals with them as a single group in clause (1) (substituting the expression "only a sum certain" for the present expression "only money"), and requires the clerk to prepare, sign, and enter them forthwith, without awaiting court direction, unless the court makes a contrary order. (The clerk's duty is ministerial and may be performed by a deputy clerk in the name of the clerk. See 28 U.S.C. § 956; cf. Gilbertson v. United States, 168 Fed. 672 (7th Cir. 1909).) The more complicated judgments described

in clause (2) must be approved by the court before they are entered.

Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. See Matteson v. United States, 240 F.2d 517, 518–19 (2d Cir. 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal. See id.; and compare Blanchard v. Commonwealth Oil Co., 294 F. 2d 834 (5th Cir. 1961); United States v. Higginson, 238 F. 2d 439 (1st Cir. 1956); Danzig v. Virgin Isle Hotel, Inc., 278 F. 2d 580 (3d Cir. 1960); Sears

v. Austin, 282 F. 2d 340 (9th Cir. 1960), with Matteson v. United States, supra; Erstling v. Southern Bell Tel. & Tel. Co., 255 F. 2d 93 (5th Cir. 1958); Barta v. Oglala Sioux Tribe, 259 F. 2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); Beacon Fed. S. & L. Assn. v. Federal Home L. Bank Bd., 266 F. 2d 246 (7th Cir.), cert. denied, 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); Ram v. Paramount Film D. Corp., 278 F. 2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U.S. District Courts for the Eastern and Southern Districts of New York; Ram v. Paramount Film D. Corp., supra, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b) (1) and (2) covering the subject of judgments by default.

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